No. 3721

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. R. GRACE & COMPANY
(a corporation),

Appellant,

vs.

FORD MOTOR COMPANY OF CANADA, LTD. (a corporation) and ROBERT NETTLEFOLD,

Appellees.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

BRIEF FOR APPELLEES.

W. F. WILLIAMSON,
Proctor for Appellees.

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BRIEF FOR APPELLEES.

The first twenty-four pages of the Brief for Appellant are devoted to what is termed a "Statement of the Case". The statement, however, does not state, or attempt to state, all of the facts. There are many quotations from letters and telegrams, but, as may be seen by reference to the cited pages

of the record, such quotations are almost universally incomplete, and in some instances sentences are broken and detached portions thereof only are quoted. Nor are all the letters and telegrams quoted or referred to. The mass of detached and imperfectly quoted matter, is interspersed with argument with the result, we believe, that the Court can get, therefrom, no correct understanding of the case presented on this appeal. We shall, therefore, briefly state the facts of the case before directing our attention to the questions argued by appellant. In the course of the argument, we shall have occasion to refer to the correspondence, which renders further comment thereon unnecessary at this time.

Statement of the Case.

In February, 1916, respondent was making large shipments of automobiles to Australia and New Zealand and was contracting ahead for carrying space on steamers to meet its requirements by months. On February 23rd, it wired to the San Francisco office of the Ford Motor Company, a separate corporation, as follows:

> "Have arranged with Illinois Central representing Hind Rolph for Union Steamship Co. for 4000 tons and with Southern Pacific it is likely for 2200 tons April and May; would like another 4000 tons May and June sailing; offer $47.50".
>
> (Apostles on Appeal 361.)

L. C. Davis, Traffic Manager of the Ford Motor Company at San Francisco, began negotiations with libelant and on February 24, 1916, wired respondent as follows:

> "If you can take 6200 tons for early June can close with Grace Company same rate Wellington and Sydney or Wellington and Melbourne". (265.)

Respondent under date of February 25th, wired Ford Motor Company at San Francisco, as follows:

> "Accept Grace offer 6200 tons confirm advising names and dates of sailing". (265.)

On the same day, February 25th, libelant prepared the contract of affreightment sued upon in this action and which is attached as an exhibit to respondent's answer (Exhibit "A," Apostles on Appeal, page 46). This contract was accepted by Mr. Davis, acting for respondent on that day, and on February 27th, he wired respondent "Have signed with Grace American steamer Cacique about June 24th. Union advised Illinois Central made firm offer your account 6000 tons at $52.50" (265).

On March 1, 1916, Mr. Davis wrote respondent confirming the telegram last mentioned, and enclosing a copy of the contract of affreightment. In this letter, the sailing date of the Steamer Cacique was given at "about the 14th of June" (268). In some manner, this letter and the contract, enclosed with it failed to reach respondent's office, and a copy thereof was forwarded from San Francisco about April 3, 1916 (272-273-276). In

the meantime, other commitments had been made by respondent for shipments both from San Francisco and from Montreal.

On April 3, 1916, and again on May 1st, respondent advised the Ford Motor Company of San Francisco that, owing to non-receipt of the contract with Grace & Company, and, being without knowledge of its terms, it had made "certain space engagements for May", etc., which took up a portion of the 6200 tons and, therefore, respondent had but 4284 tons for shipment on the Steamer Cacique. The letter continues:

> "However, we expect certain additions from Australia which will no doubt bring our specifications up to the required amount".

The record contains a number of letters which passed between the respondent's office in Ontario and the San Francisco office of the Ford Motor Company, in respect to this tonnage.

On May 1, 1916, respondent wired Ford Motor Company at San Francisco that 5658 tons would be sent forward for shipment under this contract. On that and successive days in May, shipments were made on ocean ladings to San Francisco for movement on the Steamer Cacique and respondent contracted with Peabody & Company for 542 tons which it was then thought would make up the complete tonnage required under this contract (280-283-284). These shipments, however, made a total of only 4575 tons. When respondent discovered this shortage and while the shipments were en route to

San Francisco, respondent, on May 25, 1916, directed Traffic Manager Davis of the Ford Motor Company of San Francisco to borrow 1500 tons from shipments previously made to San Francisco for transport on the Union Steamship Company's steamers, agreeing to replace them with later shipments (289). Respondent advised libelant of these conditions, and of the efforts being made to borrow the 1500 tons from the Union Steamship Company's shipments. The 1500 tons were then in San Francisco awaiting shipment on the Union Steamship Company's steamer, but there was some uncertainty on the part of respondent, as to whether the Union Steamship Company would be able to meet its obligations as to the movement of these shipments. Efforts to borrow the 1500 tons failed on June 1st, which still left respondent short 1500 of the 6200 tons contracted for in the contract in suit.

On June 1st, respondent wrote libelant of the existing shortage advising that 4075 tons had been forwarded for shipment on the Cacique, that respondent had effected an arrangement with the Union Steamship Company of the transfer of 1500 tons, and that 524 tons (which was actually 572 tons) had been procured elsewhere which made up a total of 6099 tons. In the same letter, respondent advised libelant that it was respondent's understanding that the Steamer Cacique would leave on June 14th, and again that it would sail June 24th, and that its plans had been made accordingly. Attention was also called to the fact that the sailing date, as then

learned, was July 10th upon which ground, respondent disclaimed liability if it should not be able to supply the full 6200 tons (49). The contention was advanced by respondent that the contract "calls for June loading, which in the parlance must necessarily mean June shipping".

In response to this letter, libelant wrote respondent June 6th taking issue with respondent's contention as to June shipment and requiring that respondent's shipments must be "alongside our vessel on June 27th ready for loading as fast as ship can receive" (47-48).

Replying to this letter, on June 14th, respondent confirmed its previous statements as to the tons of cargo forwarded for shipment on the steamer Cacique, but while offering said shipment advised libelant that if the letter attempts to hold the tonnage actually shipped for dead freight, respondent would decline to load any of the cargo. In the same letter, respondent attempts to show, in an argumentative way, that the contract of February 25, 1916, was not binding upon respondent, inasmuch as the "Steamer Cacique had taken out a clearance for July 5th instead of loading and clearing in June". The letter closed with the statement

> "Our shipments of the 4075 ton quantity will be ready and alongside your steamer on June 27th as indicated by you". (Exhibit "D", pp. 50-51.)

On June 22, 1916, libelant advised respondent at San Francisco, as follows:

"Supplementary to our letter of June 6th advising that Steamer Cacique would be ready for loading June 27th:

"Please note the delivery of 6200 tons automobiles and parts full quantity your engagement under contract, dated February 25th, must commence on that date, June 27th, and be completed not later than June 29th."

A letter was written by Mr. Davis of the Ford Motor Motor Company to the railroad company, which letter bore date June 22nd.

"Until you are advised to do so, please do not under any circumstances deliver any of the cargo at present on hand booked Steamer Cacique to W. R. Grace & Co."(303).

At or about that time, whether before or after, is not clear from the record, but is immaterial in view of the letters which passed between respondent and libelant, there was delivered upon Pier No. 26, at which the Steamer Cacique was to dock, about 1100 packages of respondent's automobiles, a total of about 1500 tons, for shipment by the Cacique, and they were so received by libelant. In its brief, libelant argues that these 1500 tons were delivered by mistake, or partly in contravention of the order, above mentioned, to the Southern Pacific Company. This question is set at rest, however, by the allegations in paragraph V of the libel, that the 1100 packages referred to

"were deposited by respondent, Ford Motor Company of Canada on Pier 26 in the City and County of San Francisco, the wharf of libelant,

alongside of which said Steamer Cacique was to dock", etc. (11.)

Libelant's manager states that these packages were so delivered and received as freight for the Steamer Cacique and appellant actually seized them under the libel in rem in this action on June 27th (228-230).

On June 24th, respondent's San Francisco agent addressed another letter to libelant stating that 4075 tons is the entire cargo for the Steamer Cacique, announcing his purpose to withhold loading of that cargo if libelant intends to hold said 4075 tons for the full freight of 6200 tons (138).

On the night of June 26th, libelant telegraphed respondent at Ford, Ontario, referring to the contract, acknowledging receipt of the above-mentioned letters of June 14th and June 24th, and insisting upon fulfillment of the contract "in every particular". Libelant stands "strictly upon the contract" and declared its readiness to perform the contract and its willingness to accept such quantity "of automobiles as are delivered to us and hold you responsible for all damages, including demurrage which we may ultimately sustain by reason of any breach of said contract". In the same telegram, libelant also stated that it does

> "not accept such smaller quantity as full satisfaction of the contract of February 25th, but only as the partial satisfaction which it in fact, is; and by acceptance of any such smaller quantity we do not in any way release or waive any

claim for damages or demurrage due to your breach of your contract''.

This telegram was confirmed by letter to the San Francisco office on the same day (138-139).

At about 7:30 A. M. on June 27, 1916, the Steamer Cacique arrived at San Francisco, and shortly thereafter docked at Pier 26. At that time and throughout the unloading of the inward cargo, there was a general strike of stevedores in effect on the whole of the San Francisco Water Front. S. S. Cacique brought a mixed cargo of 7900 tons from Oriental ports which was a full cargo for the vessel. This cargo was unloaded as rapidly as possible. The unloading was completed on July 8th, at 6:00 P. M. after which the vessel went into dry dock. When the vessel docked at Pier 26 and continuously thereafter while the vessel was unloading and until after July 12th when the vessel returned to Pier 26, the 1100 packages of respondent's automobiles, approximating 1500 cargo tons, remained on said pier where they had been placed on June 23rd and June 24th. No cargo was loaded, nor was attempt made to load any, until July 12th.

On June 27th, the date of the vessel's arrival at the port of San Francisco at 4:00 o'clock in the afternoon, libelant began the present action, and by libel in rem seized the 1100 packages in its possession, and by writ of foreign attachment levied upon about 4000 additional tons of automobiles, the property of respondent, then in the possession of the

Southern Pacific Company at San Francisco. This included all of the shipments made by respondent to San Francisco for ocean carriage. The property so libeled and attached, remained in the custody of the United States marshal under said libel and writ, until July 5, 1916, when it was released on bond furnished by respondent and subsequently was loaded upon the Steamer Cacique and transported to Australia and New Zealand. None of this cargo was loaded, however, until after July 12th and it was not completely loaded until July 26th. The vessel sailed on the morning of July 27th.

In the meantime and as soon as the vessel had completed her unloading on the afternoon of July 8th, she was ordered into drydock by Lloyd's surveyor and underwent repairs while in drydock. Until such repairs had been made, the vessel was unseaworthy and would not have been allowed to clear the port at San Francisco. We particularly stress the date and hour of the arrival of the Steamer Cacique at the post of San Francisco, because appellant in its brief has stated, perhaps unintentionally, that the S. S. Cacique arrived and berthed in the evening of June 27th (27) and that the goods were libeled before the vessel arrived and berthed. Both of these statements in appellant's brief are incorrect. The vessel arrived in the port of San Francisco and commenced the discharge of her cargo at 7:30 o'clock of June 27, 1916 (see Answers to Interrogatories 11 and 12, page 71, Apostles on Appeal). This action was begun and the goods were

libeled later in the day, which fact was admitted by appellant's manager.

One June 28, 1916, which was the day following the arrival and berthing of the Steamer Cacique at San Francisco, libelant telegraphed respondent at Ford, Ontario, and also advised respondent's local agent, as follows:

> "Please take notice that, in accordance with our previous advices, the Steamship "Cacique" was ready to load your cargo contracted for on February 25th, 1916, on *June 27th, 1916, at 9 P. M.* As you have failed to deliver the cargo alongside steamer as fast as vessel can load, demurrage at the rate of $3000.00 per day commences on the day and at the hour last mentioned.
>
> We this morning wired above to your Ford, Ontario, office." (141.)

The hour named in the telegram, 9:00 P. M. June 27, 1916, as the time at which the vessel "Cacique" was ready to load respondent's cargo, was several hours after the present suit had been filed, and the freight and cargo libeled, and was two days short of the time allowance fixed in the letter of June 22nd, previously noted, as the time during which respondent should deliver its cargo tonnage to libelant (225).

The District Court filed a written opinion holding that the contract required that the cargo should be loaded in the month of June, 1916; that there had been no actual breach of the contract on the part of the respondent at the time the action was commenced; that there had been no breach by respond-

ent of the contract in anticipation of the time of performance, and that libelant could not proceed in rem against the portion of the cargo that had been delivered and received as freight and at the same time prosecute the action on the theory that there had been an entire and complete breach by repudiation. Accordingly, the libel was ordered dismissed and a final decree was so entered.

At pages 26 and following of the Brief for Appellant, proctors for appellant present four main propositions which we shall consider in their order.

I. ANSWER TO THE ARGUMENT THAT THERE WAS AN ACTUAL BREACH OF THE CONTRACT BY RESPONDENT.

We have grave doubt of the propriety of appellant's argument in this behalf, inasmuch as the libel charges only a breach in anticipation of the time when performance was due. We prefer, however, to meet the issue on its merits. Appellant's argument on this breach of the case is founded on certain premises which an examination of the record will be found to be not entirely correct. Passing such as might be considered inferences drawn by counsel, we deem it proper, if not necessary, for a true presentation of the case to note the following:

Respondent had in San Francisco on June 27th for shipment on the vessel Cacique not 4,075 tons but 4,650 odd tons which were subsequently actually conveyed on said steamer (193).

We have already adverted to appellant's error as to the day and hour at which the steamer Cacique was expected to and did arrive at her berth. She arrived and berthed on the morning of June 27th at 7:30 A. M. (71).

Appellant's statement that the Southern Pacific, presumably as distinguished from respondent, delivered a portion of the cargo to appellant, cannot be considered in the light of the express allegation in the libel, nor may any inference be rightly drawn by appellant as against the respondent from any act or statement of the Southern Pacific.

Appellant's statement that notice was given to the Southern Pacific not to give any cargo to libelant is subject to the correction that the notice said "Until you are advised to do so", etc., and that letter was given before performance on respondent's part was due (304).

We concede the correctness of appellant's statements, that respondent started to fill the contract on May 1st, and on May 11th found it impossible to ship the full cargo contemplated; actually shipped at that time only 4075 tons; all of which had arrived in San Francisco before the libel was filed, and that 30 cars, or about 1500 tons, had been delivered on libelant's wharf. We will also concede, for the sake of the argument of this proposition, that respondent refused or at least failed to deliver the full 6200 tons contracted for. It is also claimed that respondent's goods were stopped in transit in order to com-

pel the making of a new contract, and that libelant was notified not to touch respondent's cargo or to prepare it for loading on the Cacique. This was either an unintentional misstatement of fact, or an unwarranted inference, drawn by appellant, from something that may have been stated by an employee of the Southern Pacific Company either before or after the suit was filed. There is no evidence that an employee of the Southern Pacific, or any other person, made such a statement or gave such a notice, and, if it had been so given by some employee of the Southern Pacific, it was not binding upon respondent and should be dismissed in the consideration of the case.

With these preliminaries disposed of, we will proceed to a consideration of the arguments advanced in appellant's behalf.

In substance appellant's argument is that although both parties had as early as May 1st begun performance of the contract and respondent had sent forward 4,075 tons, which had reached San Francisco for shipment on the Steamer Cacique before the vessel arrived at the port of San Francisco on June 27th, respondent's failure or refusal to furnish the full 6200 tons of cargo on or before that date constituted an actual breach of contract. To sustain this claim, it was necessary for appellant to show that performance on respondent's part was due on June 27th, and that libelant was ready, able and willing to perform its obligations. The District Court held that there was no actual breach of the

contract, for the reason that performance on respondent's part was not due when the libel was filed, and that on June 27th the steamer "was not ready to take on cargo and could not have been made ready to do so" (450).

Proctor for appellant asserts that the Court was in error. No principle of law is invoked, however, and none could be, as it is fundamental that there could be no actual breach of a contract where performance was not due; nor could there be recovery for breach if the party seeking recovery was not able, ready and willing to perform. Counsel's exception, therefore, must be based on the facts. Respondent's obligation was to deliver alongside the steamer "as fast as vessel can load" 6200 tons of automobiles in packages for "shipment per American S. S. 'Cacique' June loading". The contract also required libelant to advise "definitely exact loading date" (47). Libelant with full knowledge of the steamer's disabled condition, and of respondent's apparent inability to deliver the full tonnage contracted for, under the terms of the contract, notified respondent in writing on June 22nd that the vessel would arrive June 27th, also as follows:

> "Please note the delivery 6200 tons automobiles and parts, full quantity your engagement, under contract dated February 25 must commence on that date June 27th, and be completed not later than June 29th". (351.)

Respondent, therefore, was required to perform the contract and deliver its 6200 tons of cargo dur-

ing three full days, the 27th, 28th and 29th of June, and then only "as fast as vessel can load", because such was the provision of the contract. In no event could respondent be in actual default until the three days had elapsed, and then, only, if the vessel had been ready to load.

The action was begun on the 27th day of June, the day that the vessel arrived. At that time two and one-half of the three days specified by libelant in its notice of June 22nd had not expired. It was clearly shown that at no time during the 27th day of June, or for some time thereafter, could libelant have loaded any of its cargo. The condition of the vessel in respect to her inability to load, is best shown by the following admission on the part of libelant:

The vessel arrived and docked on the morning of June 27th. She had a full cargo of 7900 tons Chinese merchandise. She did not complete unloading her inward cargo until the afternoon of July 8th (71-72). Libelant's manager did not expect to commence loading before the 30th day of June (210) and became satisfied, subsequently, that the ship could not take on any freight before the last minute of the last day of June (211). There were on the dock, when the vessel arrived, and, thereafter, continuously until subsequent to July 12th when the same were actually loaded, 1100 packages or 1500 tons of respondent's cargo. This cargo was ready for shipment (226). It was received by libelant as freight and so attached by the libel in rem (230).

Any doubt upon this subject is set at rest by the statement of the same witness that on June 28th, libelant had not been in a condition to load any freight on the Steamer Cacique (223). The steamer had suffered injuries of a serious nature on her inward voyage. Libelant's manager admitted that the vessel would not be permitted to sail, without a seaworthy certificate from Lloyd's (239); and that it would also be necessary to fumigate the vessel (228).

Joseph Blacket, surveyor for "Lloyd's Register" of shipping at San Francisco, ordered the vessel to drydock in view of the report of the surveyor at Hong Kong, and required that certain repairs be made. He testifies that without such repairs the vessel was unseaworthy, and would not have been permitted to go to sea (244). W. E. Heppel, surveyor for Johnson & Higgins, testified to the same effect (342, 343).

No testimony was offered to controvert that. In fact the injuries described by the surveyors were admitted by libelant in its answers to interrogatories attached to respondent's answer. Therefore, the vessel was unseaworthy, and libelant, for that reason, as well as others, was unable to load, and did not load, any cargo during the month of June.

The libel was filed on the 27th of June, which was in advance of the time when performance was due on respondent's part, and, therefore, in advance of an actual breach of contract, and the District Court so decided.

Libelant's argument that the attachment by libel in rem of the 1100 packages was more consistent with an actual breach of the contract, than with a partial performance thereof, is rather more specious than sound. Had there been an actual breach, the packages could have been so attached, but it does not follow that there was an actual breach because the packages were attached. While the argument has more the character of shadow than of substance, the verified libel charges that these packages were delivered in part performance (11).

Finally, proctor for libelant charges that respondent breached the contract by a letter of June 1st, from which a detached sentence is quoted. A breach at that date could, at best, be only anticipatory, and not actual. Furthermore, the quoted passage was qualified by later letters and by its context, and was not the breach alleged in the libel. We shall address ourselves to anticipatory, as distinguished from actual, breaches in later pages devoted to a consideration of appellant's argument on that breach of the case.

On the uncontroverted facts, as shown by the record, the steamer was not ready to load any of respondent's cargo on June 27th, or during any day in June; and the time for performance or delivery on respondent's part had not arrived, when the libel was filed, as was shown by the letter and telegram sent to respondent on June 28th (141). It follows that there was no actual breach on respondent's part, and the District Court correctly so decided.

II. ANSWER TO THE ARGUMENT THAT RESPONDENT COMMITTED AN ANTICIPATORY BREACH.

Appellant's first proposition is that the case was decided on "mere technicalities". Appellant was permitted to introduce all the evidence which it had to offer. It was given access to the files and correspondence of respondent and introduced the same. Proctor for appellant argued the case orally and presented a written memorandum. The District Court rendered its decision on fundamental legal grounds, holding that the contract required June loading; that libelant was, itself, unable to perform the contract or to load any cargo in June; that respondent did not commit an actual breach of contract, nor was there an anticipatory breach thereof. There was nothing technical in this disposition of the case upon its merits.

Passing the reference to counsel for respondent, which, to say the least, is most unusual, we note libelant's contention that on this appeal errors of date, questions of variance, shortcomings of counsel, technical rules and forms will be disregarded. We cannot agree to the broad contentions reserved by libelant nor do such contentions find support in our understanding of the decisions or the rules of this Court. The learned District Court rendered an opinion in writing which is set out at page 450 and following, Apostles on Appeal. It was predicated upon fundamental principles of law that cannot be questioned. The evidence cited in the opinion is uncontroverted, and supports the decision in every

particular. The decision, itself, disposes of every argument advanced by the appellant on this appeal. Appellant's case failed, not because of any variance between the pleadings and the proof, or on account of any technical error; but because appellant's evidence failed to make out any case whatever. Appellant had every facility on the trial to sustain its theory of the case and respondent offered no defense not clearly stated in its answer. On such a record it would be manifestly unjust to disregard the verified libel, the answers to the interrogatories, the documentary evidence or the testimony of appellant's manager, and unless all of these elements are disregarded in this Court, the decision of the learned District Court cannot be successfully questioned.

The cases cited by appellant deal merely with the situation that results when the appellate court can see clearly, from the record, that appellant has made out a complete case, but that he has failed to obtain relief because of his failure to properly state his case.

In *Davis v. Adams* the appellant had proceeded below on the theory that he had been enticed aboard the appellee's ship and detained against his will. The case proved, was that he had signed articles but was discharged without cause before the end of the voyage. The appellate Court sent the case back, with instructions to allow appellant to amend his libel to conform to the facts established

by the evidence, and upon such facts to enter judgment.

The libel considered in *The Gazelle and Cargo* claimed only demurrage and expenses to the amount of $2,470.20, and general relief; judgment was for more than the specific amount claimed. The Court stated that the libel set forth all the material facts ultimately found by the Court. The decree was very properly affirmed on the ground that the Court might award any relief "which the law applicable to the case warrants".

In *Wiggins Ferry Co. v. Ohio & M. Ry. Co.* the Court was considering its power to remand the case "for an amendment of the pleadings and such further proceedings as may be consonant with justice". In that case the appellant endeavored to recover rent, on the theory that the relation of landlord and tenant had subsisted. The Court held that no such relation existed, but that appellant was entitled to some compensation for the occupation of its property by the appellee, who was under equitable obligation to perform the covenants forming the consideration of the grant, so long as it held possession. The case was sent back to allow appellant to amend its pleadings. It was merely in view of this situation that the Court made the remark quoted at page 33 of Appellant's Brief; and that quotation is preceded by the following:

> "Rules of pleading are made for the attainment of substantial justice, and are to be construed so as to harmonize with it if possible".

Respondent would earnestly object to any amendment of the libel at this time, not only because such amendment would not aid substantial justice, but because it would work a distinct and substantial prejudice to respondent. The wheels of time cannot be turned back to June, 1916, at which time appellant with the knowledge of all the facts disclosed upon the trial, elected its remedy. The conduct of respondent at that time, and its course at all times since, and during the trial has been controlled by the case as made by appellant's pleadings and its evidence.

Nor can appellant in this Court claim a benefit from an assumption of mistake on its part in libeling "the 30 carloads of automobiles in its possession by process in rem", or because respondent might have had such attachment set aside on motion. The evil of appellant's position is deep-rooted, and was not the result of hasty action prompted by ignorance of the facts. The filing of the libel and the seizure of the 1100 packages of freight in its possession was the deliberate consummation of a policy declared in its letters and notices to respondent. The libel in this action alleges that respondent breached the contract in anticipation of performance due, by two letters: One dated June 14th and received by appellant on June 23rd; the other, dated June 24th and received before June 26th" (Paragraph VI of the libel, page 11 of the record). We do not concede that those letters, or any acts of respondent, in the light of the facts then known to the parties,

amount to an anticipatory breach of the contract sued upon. They wanted the unqualified, positive refusals to perform the whole contract, which were essential to constitute a breach before performance was due, under the rule of the Supreme Court of the United States as declared in *Dingley v. Oler,* 117 U. S. 490, and *Roehm v. Horst,* 178 id. 1. But, if we grant for the purposes of our discussion of this branch of the case, that such letters amounted to a breach, libelant was required to promptly elect either to consider the contract breached, in which event it could sue for damages without waiting until performance was due; or to ignore the breach and keep the contract alive, in which event it must delay action and give to respondent the chance to perform when performance was due (*Wells v. Hartford Manilla Paper Co.,* 55 Atl. 602).

Appellant pursued the latter course, believing respondent unable to perform its contract, until the vessel had reached the port of San Francisco, and appellant had become satisfied of her unseaworthiness and of appellant's inability to load any cargo in June. Then, and not until then, did appellant treat respondent's letters as constituting an anticipatory breach. Without further demand, or communication with respondent, appellant then began its action and seized by process in rem, the portion of respondent's cargo which it already held as freight.

Appellant's plea for indulgence, on the ground of pretended mistakes and want of information at

the time the suit was filed, comes with bad grace in view of the documentary and oral evidence produced by appellant itself. Appellant knew that the vessel Cacique might require some repairs in San Francisco and, as early as June 6th understood that the vessel would not be able to unload her inward cargo, load her outward cargo and sail until some time in July (221). Appellant also knew, because it was obvious that a late sailing date might enable respondent to secure additional cargo to make up its short tonnage, but knowing these facts, appellant nevertheless demanded on June 22nd delivery of the complete cargo on the 27th, 28th and 29th days of June, notwithstanding the fact that the contract required delivery only "as fast as vessel can load". On June 26th, in responding by telegram and letter to respondent's letters of June 14th and June 24th, wherein respondent admitted its present inability to deliver the whole tonnage, and claimed in an argumentative way that appellant was, itself, unable to perform its contract, or had breached it, by reason of the fact that its vessel would not load or sail until July, and in which letter, also, respondent insisted that the 4000 odd tons, which it was then able to deliver should not be held for dead freight for the whole 6200 tons contracted for, appellant deliberately stated its readiness and ability to perform the contract according to its terms, and demanded that respondent do likewise, and stated that it would accept respondent's cargo as part performance of the contract, but not as

complete performance. Appellant did not, however, reply to respondent's claim that the 4000 odd tons should not be held for dead freight. The letter and telegram definitely announced that no anticipatory breach would be accepted, and that the contract was still in force and would be performed by appellant:

> "We now have to advise you that we stand strictly upon the contract made with you, and insist upon your fulfillment of the same in every particular. We are, and have always been, ready to perform all of our obligations under said contract. We further advise you that we will take such quantity of automobiles as are delivered to us and hold you responsible for all damages, including demurrage which we may ultimately sustain by reason of any breach of said contract. * * * We do not accept such smaller quantity as a full satisfaction of the contract of February 25th, but only as the partial satisfaction which it, in fact, is".

We come now to the morning of June 27th. The vessel arrived at about 7:30 in the morning and berthed shortly after. She was then unseaworthy. The nature and extent of her injuries are set out in the answers to the interrogatories, and in the ship's logs and surveyor's reports, attached as Exhibits "A" to "G" inclusive, to be found at pages 76-92 inclusive of Apostles on Appeal. It is unnecessary here to detail the nature of the injuries. They are uncontroverted and the surveyors called for respondent, unhesitatingly testified, without contradiction, that in the light of those injuries the vessel was unseaworthy when she reached this port,

and at all times until July 12th (pp. 244, 342, 348, 349). Lloyds' surveyor, Mr. Blacket, testified also that the vessel had gone on drydock and made the repairs (page 244). Mr. Carter, manager for appellant, testified that without such seaworthy certificate from Lloyds', the vessel could not have cleared at the port of San Francisco (p. 209). Knowledge of the unseaworthiness of this vessel was brought home to appellant. Though appellant's manager, at several points in his examination, expressed himself as unable to state that the nature and extent of the injuries which rendered the vessel unseaworthy, were brought home to him on the morning of June 27th, he does admit that the limited survey issued by Lloyds' surveyor in Hongkong and the log of the vessel, were "ship's papers" which would be turned into the office of appellant by the Captain immediately on the arrival of the vessel (pp. 208, 240). A fair conclusion from Mr. Carter's testimony is that he knew the unseaworthiness of his vessel in the forenoon of June 27th, and that was the second circumstance which moved appellant to recur to earlier letters from respondent and seek to base a charge of anticipatory breach thereon. Appellant's course was dictated by the knowledge that, after all its threats and assertions, it was unable to perform the contract, whether complete loading was required in June or the time specified in appellant's notice of June 22nd.

The third explanation of appellant's change of front, if we may be permitted to use the expression, is found in a review of the evidence on the subject of loading. Appellant had been advised of respondent's claim that the words "June loading" required complete loading in June. Assuming that conditions were normal at the port of San Francisco, and that unloading of the inward cargo proceeded during the full twenty-four hours of each day, the shortest period of time fixed by any witness as necessary to unload the inward cargo was seventy-two hours or three days. The morning of June 30th was thus fixed as the earliest time when loading of the outward cargo could have been begun. It was probably this knowledge which prompted appellant to specify in its previous notice that respondent's cargo should be delivered alongside the vessel on the 27th, 28th and 29th days of June. Appellant's manager, Mr. Carter, testified that it was appellant's purpose to commence loading on the 30th (p. 210) on the theory that by loading some, though only a few packages, of the freight upon the vessel, appellant would have made a "June loading" within the terms of this contract. Later the witness admitted that this would have been only a pretense or an impractical thing not usually done, in order to establish a technical "June loading" (219). There were, however, on the dock at that time 1100 packages or about 1500 tons of respondent's cargo for shipment on this vessel. It was there as freight according to the witness and also

according to the allegations of the libel. Whatever may be the claim of appellant as to a mistake on the part of the Southern Pacific, there was nothing to restrain the loading of that portion of the cargo which was on the dock. It was there as freight. It was consigned to the vessel, and no communication from the respondent or the railroad company interfering with its loading, was introduced in evidence. No effort was made to load it, however. The witness testified that developments subsequent to the arrival of the vessel satisfied him that the ship could not take on any freight before the last minute of the last day of June (pp. 210, 211), and on account of the strike it was impossible to secure enough men to complete the discharge of the inward cargo in June. Appellant had even considered loading a portion of respondent's cargo between decks and before the holds were cleaned or the vessel fumigated (pp. 215, 216). This would have subjected respondent's cargo to fumigation overnight with cyanide of potassium (216, 228). The witness stated, however, that it was impossible to load any of the cargo during June (215).

The knowledge of these conditions and of the further fact, admitted by appellant, as to the leaks in the deep bottom fuel oil tanks, served to convince appellant of its inability to load any portion of respondent's cargo in June, whether June loading was requisite under the terms of the contract, or by virtue of the notice given to respondent by appellant to deliver its cargo on June 27th, June 28th

and June 29th. It was then that appellant deliberately concluded to begin its action as for an anticipatory breach on the part of respondent. This course was taken, in the hope that by so doing, appellant would escape the effect of its own inability to load respondent's cargo, or any part of it, in the month of June. This is significant not only as reflecting the true understanding of the contract, but as showing the motives of appellant. Appellant did not ask if there was any reason why the portion of the cargo on the dock should not be loaded. It did not want any more cargo delivered, because it was unable to load that which was already in hand, and, without waiting until the night of the 29th during which time, by virtue of its previous notice, respondent was permitted to deliver its cargo, it filed suit and libeled the cargo on the 27th day of June. The cargo libeled was in part in appellant's possession and in part in the yards of the Southern Pacific Company. In all there were 150 freight cars, exclusive of the 500 odd tons of Peabody cargo, and the 30 carloads which had been unloaded on appellant's dock and which could not be moved without appellant's consent. Appellant had some purpose in filing its libel with such haste, and the explanation is that it wanted to begin action before performance could be made by respondent.

Mr. Carter, manager for appellant, admits that when the libel was filed, the Ford Motor Company of Canada had still forty-eight hours within which to comply with appellant's request to deliver the

cargo (225). Another significant circumstance is that on the morning of June 28th, appellant telegraphed and wrote respondent as follows:

> "Please take notice that, in accordance with our previous advices, the Steamship "Cacique" was ready to load your cargo contracted for on February 25th, 1916, on *June 27th, 1916, at 9 P. M.* As you have failed to deliver the cargo alongside steamer as fast as vessel can load, demurrage at the rate of $3000.00 per day commences on the day and at the hour last mentioned." (141.)

"*June 27th, 1916 at 9 P. M.*" was specified as the hour at which the vessel was ready to load. That hour was several hours after this action had been begun, and respondent's cargo had been libeled, which fact appellant well knew. If the vessel was not ready to load until *9 P. M.* on June 27th, appellant's libel, filed some hours earlier, was false in stating that libelant was then ready to perform its contract. But the most damning circumstance, and the one that carries conviction of appellant's bad faith, is the admission of appellant's manager, previously noted, that up to the end of the 28th day of June, appellant had not been in a condition to load any freight on the Cacique (223). These facts and others in the record, which it is unnecessary to note, show conclusively that appellant was attempting to play fast and loose in this transaction. If the letters, counted upon in the libel, were in fact breaches of the contract, the duty devolved upon appellant to accept them as such promptly, if it

intended to, or to continue the contract in force. It elected, by its letter and telegram of June 26th, which were prepared not by a clerk but by appellant's manager, to accept the part performance offered by respondent and to stand strictly upon the contract (138). The contract was thus kept alive for all purposes and as binding both parties. When, however, appellant became aware of the unseaworthiness of its vessel, and of its inability to unload the inward cargo, as rapidly as was expected, and to load any of the outward cargo during the month of June, appellant filed its action. The law does not permit of this:

Dingley v. Oler, 117 U. S. 490;
Wells v. Hartford Manilla Paper Co., 55 Atl. 602.

In concluding this branch of the argument, we submit, without disrespect, that an appellant, who had attempted to draw the lines as finely as was done in this action, is not entitled to any sympathy or indulgence at the hands of a Court of Admiralty, or of any other Court.

The evidence above cited is more than sufficient of itself to sustain the decision of the District Court that there was no anticipatory breach of the contract sued upon. If the letters tendered a breach by anticipation, that breach had not been accepted on the part of appellant, but, on the other hand, appellant in unequivocal and positive terms, had continued the contract in force by its letter and

telegram of June 26th, previously noted. The letter and telegram of June 28th (51-52) contained unmistakable proof that the contract had been kept alive by appellant until at least 9 P. M. on June 27th, which was 24 hours after the libel had been filed. Appellant there refers to the contract, notes the fact, although untrue, that the cargo was not delivered as fast as the vessel could load, and closes with notice of a demurrage claim at the rate of $3000.00 per day. There was no provision for delivery of the cargo as fast as the vessel could load, except in the contract; and there was no provision for the collection of demurrage at the rate of $3,000.00 per day, but in the contract. There was no necessity of any notice whatever on the part of appellant if, as claimed, the contract had been already breached in anticipation. As to this letter and telegram, the intention and the understanding of the appellant to stand upon the contracts, as still in force, is conclusively shown by the following question and answer of appellant's traffic manager.

> "Q. And you intended to tell the Ford Motor Company in that letter that that contract was still in force as to the demurrage for $3,000.00 a day, did you? A. Yes." (162.)

Ignoring these facts, however, appellant attacks that portion of the opinion wherein the District Court holds that libelant elected to accept the 1100 pieces as part performance of the original contract, and that there was no anticipatory breach, because at the time the libel was filed, libelant had accepted

the 1100 packages in its possession as freight. Counsel charges that the court was in some manner confused as to the rights and liabilities of the parties. The opinion of the learned District Court is, however, sound in law, and supported by the facts in this case. The 1100 packages were sent to San Francisco as cargo for the Cacique. There was no other freighting contract between the parties except the one with which this action is concerned. As alleged in the libel the packages, aggregating 1500 tons, were delivered at libelant's pier at which the Cacique was to dock and did dock. Appellant's manager testified that these packages were in libelant's possession "as freight" at the time the Libel was filed (451). This was necessary to support the action in rem, and the existence of such condition destroyed any possibility of there being an acceptance of any prior alleged repuditation, which was essential to a breach by anticipation.

Whatever may be its present intention, appellant, having possession of these packages on its dock for loading on the steamer Cacique, and as freight, and without restraint upon its right to load the same, considered them and treated them as freight when it filed its libel and seized them under the process in rem. Much has been said by proctor for appellant as to a telephone message from an employee of the Southern Pacific Company, and as to a letter from that company dated the 27th of June, the day the action was filed, and sent through the mail to libelant on that day, the day of its receipt being

uncertain though probably it was not received until the 28th, to the effect that these packages were delivered by mistake on the part of the railroad company. Any statement made by the railroad company as to its mistake, if any, is not binding upon respondent. However, the letters do not repudiate the contract or refuse to perform the same. Without referring to the contract at all, they merely request that deliveries be delayed until respondent directs them to be made. These letters were written at a time before delivery of respondent's cargo was required under the terms of appellant's notice. Though the local agent for respondent had directed the railroad company not to deliver any of the cargo to Grace & Company until further advised, and had even directed it to take back into its possession any cargo delivered prior to the notice, that can add nothing to the letters which passed from respondent to libelant and particularly the two letters upon which appellant relies in its allegations as to anticipatory breach. If the letters upon which the libel was charged amounted to an anticipatory breach, the letters to the Southern Pacific or any opinion or statement by the Southern Pacific Company, did not add to that breach. If, as appellant now argues, there was an actual breach by the failure to deliver the whole 6200 tons cargo, the letters to the Southern Pacific Company cannot affect that breach. It was not claimed on the trial that respondent had in any way prohibited or interfered with the loading of the said 1100 packages up to the time the libel

was filed or thereafter while the same were held by the marshal, under appellant's process. In any event, the Southern Pacific is not shown to have attempted to retake possession of any of said packages or to interfere with the loading thereof. Appellant admitted, on the other hand, that it had not been prevented from loading the said cargo (229).

Throughout its argument, libelant suffers from a confusion of the law applicable to breach by anticipation and actual breaches. There can be no question that if a contract is breached by anticipation and such breach is promptly accepted by the other party, the latter has an immediate claim for damages. This rule has no application, however, to the instant case, for, as shown by the facts above mentioned, if respondent had tendered an anticipatory breach, no acceptance thereof was made by libelant. Under the decisions, the contract was kept alive for the benefit of both parties until the time of performance fixed by the contract, and by the notice from libelant to respondent to deliver its cargo up to the night of the 29th of June.

Libelant could not play fast and loose, it could not, after receipt of the letters which it claims constituted anticipatory breach, agree to accept such goods as respondent should furnish "as the partial satisfaction which it in fact is," and declare its readiness to proceed with the contract, until the vessel arrived and was found to be unseaworthy and unable to load, and then reverse its policy and claim the benefit of an earlier repudiation of the contract.

Such course was morally wrong and is prohibited by the decisions already cited.

Appellant seeks to escape the District Court's conclusion by the argument that the libeling of those packages in rem, was merely the enforcement of a remedy following a breach of the contract. The fallacy of this argument lies in the fact that appellant presumes that there was a breach of contract. We have already shown, and the District Court so decided, that there could have been no actual breach of contract at the time the libel was filed because performance was not due, and the ship was not ready to load. It is equally clear that there was no anticipatory breach at that time because the libel alleged partial delivery, appellant's argument in this behalf is predicated upon the claim, for the first time now made, that respondent had delivered 1100 packages as part performance of a new contract. That no anticipatory breach existed on the night of the 26th of June, the day before the libel was filed, is shown by appellant's telegram and letter addressed to respondent in which appellant declares the contract still in force, and announces its readiness and ability to perform it, and insists that respondent fulfill the same "in every particular". Appellant in the same telegram and letter also agrees to take "such quantity of automobiles as are delivered to us * * * only as the partial satisfaction which it in fact is" (138 and 139). This acceptance of partial delivery is certainly broad enough to cover the goods already delivered to ap-

pellant, and, in the language of appellant's manager "held as freight". Furthermore, that the contract was still alive at 9:00 A.M. of June 27th, which was some hours after the libel was filed, and was therefore in effect at the time the libel was filed, is evidenced by appellant's telegram and letter of June 28th, previously noted.

We are not concerned with a question as to the legality of the libel in rem, or as to whether the process in rem was extra legal. Whatever the learned proctor for appellant may claim as to his inability in matters of common law, his experience in the admiralty practice certainly disentitles him to claim ignorance of the practice and the law applicable in cases of this impression. However attempted to be disguised appellant's real effort is directed not to an amendment in pleadings or in the form of the process, but to a change of basic facts. The process of the United States Court is not a falcon to be turned loose or whistled back at the whim of any litigant. If the allegation of the libel as to the delivery and acceptance of 1100 packages were expunged, the fact that the 1100 packages were delivered and accepted as freight would still remain, and that fact is the vital thing that is fatal to appellant's case on anticipatory breach. We are not attacking the validity of the libel in rem, though counsel says it was extra legal. The outstanding force of that proceeding on the part of appellant, is that it shows the understanding and intent of the libelant at the time it filed its suit. That under-

standing was best stated by its manager, when he said that the packages were on the dock in appellant's possession as freight. Such is the statement in the libel, and that understanding is the only one consistent with appellant's letter and telegram of June 26th. The seizure by process in rem of these packages in appellant's possession indicate the understanding and the intention of appellant that it had accepted such packages as freight for the Steamer Cacique and as part performance of the contract. Such act constituted an election on appellant's part not to accept an anticipatory breach, if one had been tendered.

Appellant's next position is that the 1100 packages were offered by respondent as a cargo under a new proposed contract, but in this connection appellant also says that the proposed contract was rejected. Consequently the negotiations for a modification of the original contract failed; there was no new contract and the partial performance counted upon in the libel and found by the Court, was of necessity a partial performance of the only then existing contract which is that sued upon in this case. In view of the evidence already reviewed, it is probably unnecessary for us to say that appellant's statement that when respondent left the 30 cars on libelant's wharf, it gave notice to libelant, and to the Southern Pacific that such cargo was not to be used under the original contract, is absolutely without a supporting fact in the record.

The law of anticipatory breach has been clearly settled by the Supreme Court of the United States and the appellate Courts in many of the States. We quote the following concise statement of the Rule from *6 Ruling Case Law,* at page 1025.

> "In order to justify the adverse party in treating the renunciation as a breach, the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute. * * * It may be observed, however, that the renunciation itself does not *ipso facto* constitute a breach. It is not a breach of the contract unless it is treated as such by the adverse party". (Hanson v. Slaven, 98 Cal. 377, 382 (33 Pac. 266); Bell v. Bank of California, 153, Cal. 234, 242 (94 Pac. 889).
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> "In Smoot's Case, 15 Wall, 36 (21 L. Ed. 107), it was held that mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient to terminate it; it must be distinct and unequivocal absolute refusal to perform, treated and acted on as such by the promisee. Approved in Dingley v. Oler, 117 U. S. 503. (29 L. Ed. 984, 6 Sup. Ct. Rep. 850.)"

This statement of the law was announced by the decisions of the United States Supreme Court and in the following authorities:

Roehm v. Horst, 178 U. S. 1; 44 L. Ed. 953;
Dingley v. Oler, 117 U. S. 490; 29 L. Ed. 984;
Smoot's Case, 15 Wall. 36; 21 L. Ed. 107;
Wells v. Hartford Manilla Co., 55 Atl. 599;
Williston on Sales, Sec. 586;
Benjamin on Sales, Sec. 568;

Hanson v. Slaven, 98 Cal. 382;
Bell v. Bank of California, 153 Cal. 241;
Herzog v. Purdy, 119 Cal. 99;
Kilgore v. Northwest, etc., 37 S. W. 473.

As declared by the Supreme Court of Connecticut in *Wells v. Hartford Manilla Co.* if one party unequivocally refuses to perform or repudiates his contract, the other party may adopt such repudiation

> "by so acting upon it as in effect to declare that he, too, treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end, except for the purposes of the action for such wrongful renunciation. If he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue".

In this case appellant did not acquiesce in what it now contends was a repudiation on respondent's part, nor did appellant remain inactive, nor did it take immediate action to recover damages resulting from the anticipatory breach. It elected to stand strictly upon the contract, announced its willingness to accept the cargo offered as partial performance, and insisted upon its claim for damages for any short delivery. After the arrival of the vessel

on June 27th, and before the time of performance on respondent's part was due, appellant changed its policy and then, for the first time, attempted to treat respondent's letters as an anticipatory breach. This it cannot do, for the law does not permit it to so play fast and loose.

Appellant's citation of *Tri-Bullion Smelting Company v. Jacobsen,* indicates a confusion in the mind of counsel of cases of actual breach and anticipatory breach. The Circuit Court of Appeals did not depart from the rule announced by the Supreme Court in *Roehm v. Horst,* supra. The case did not involve an anticipatory breach. The contract had been partially performed, and the question discussed and determined was, that a party who had breached the contract was not excused from liability in damages for his breach, though the other party had accepted or acquiesced in the breach. The theory of the Tri-Bullion Company was that Jacobsen's letter, urging performance and notifying the Tri-Bullion Company of his purpose to go into the market and purchase his requirements, was an acquiescence in the breach, and that such acquiescence excused the Tri-Bullion Company from liability for any damages. That was the only question decided by the court and that question is not here involved.

Appellant cites *Frankfurt-Barnett Co. v. William Prym Co.* to the point that a distinction exists between a waiver of the right to treat a breach of a

contract as a discharge of the contract, and the waiver of a right to recover damages occasioned by the breach. Respondent does not question the soundness of this distinction. The cited case, however, is without application. There was partial performance of the contract. The defendant failed to continue its deliveries as required by the contract notwithstanding repeated promises so to do. It was determined in the passage quoted by appellant that the injured party had not waived his right to damages.

Marks v. Van Eighen, 85 Fed. 853, is referred to as a case cited by respondent in the District Court. We accept it as a correct statement of the law. Under the rules there declared, appellant was required, if the letters relied upon actually constituted a repudiation of the contract, to elect whether to treat the contract as terminated or as still existing. If appellant did not do so, its right of action for a breach could only rest upon the refusal of the other party to perform the existing contract according to its terms.

With the legal principles thus established, their application to the facts of the case should not be difficult. Appellant has attempted to so apply them, but, in almost every particular, his statement of the facts does not conform to the evidence as shown by the record. In an abstract way, it is said that the contract was renounced by frequent acts and notices on the part of respondent and that libelant had elected to treat the contract as termi-

nated. We must assume that the acts and notices were those assigned in the libel, and we have already shown, we believe, that those notices were not accepted by appellant as anticipatory breaches.

Counsel's statements are merely the inference which he has drawn in the interests of his clients' cause.

Under the rule as declared by the Supreme Court of the United States, and in the case of *Marks v. Van Eighen,* two things are essential to constitute anticipatory breach: (1st) The unqualified and absolute refusal to perform the entire contract; and (2nd) The acceptance of such repudiation by acting thereon as a termination of the contract, except for the purpose of recovering damages from the guilty party. As was held in *Turner-Cummings Co. v. Ryan Lumber Co.,* 201 S. W., page 431,

> "the mere notice of an intention to breach a contract in the future, at a time when the contract is in the course of performance and is virtually being performed, is not sufficient to justify the other party to the contract to declare the contract breached".

The correspondence set out in the record clearly shows that respondent was endeavoring to secure sufficient cargo to meet the contract obligations while some 4000 tons were already en route on ocean ladings for movement on appellant's vessel at the time the letters referred to were written. In one of the letters relied upon, viz., that of June 1st, respondent advised appellant in detail of the ship-

ment of 4075 tons and announced that it had effected, as was thought to be the fact at that time, an arrangement to borrow the short tonnage from its shipments then in San Francisco for movement on the Union Steamship Company's steamers. For the purpose of the argument, however, we do not consider it necessary to discuss in detail the first of the two essentials above mentioned.

Appellant under the cited cases, must show not only the unequivocal repudiation of the entire contract, but also an acceptance thereof to sustain an action. If, therefore, the claimed repudiation was not accepted, the anticipatory breach did not exist at the time the action was commenced. The alleged breach was not accepted or acquiesced in. Three circumstances, which have been already noted and to which we shall briefly again refer, show conclusively that appellant did not accept the tendered renunciation, if any, but stood upon the contract and kept it alive for all purposes. The libel alleges that the anticipatory breach consisted of two letters written by respondent to appellant on June 14th and June 24th, respectively. On June 26th appellant's manager prepared and dispatched a telegram to respondent's Canadian office and a letter to its San Francisco agent in which, after referring to the specific contract here involved and acknowledging the receipt of the two letters so relied upon, he says

> "We stand strictly upon the contract made with you and insist upon your fulfillment of the same in every particular. We are and have

> always been ready to perform all of our obligations under said contract".

After declaring its willingness to accept the smaller quantity of automobiles offered by respondent in the letters referred to, appellant continued

> "We do not accept such smaller quantity as a full satisfaction of the contract of February 25th, but only as a partial satisfaction which it, in fact, is".

The second circumstance evidencing appellant's election to continue the contract in force, was the attachment of the 1100 packages of respondent's cargo by process in rem. As previously shown, this was delivered, and it is so admitted in the pleadings, as a part of the cargo for movement on the Steamer Cacique under the terms of the contract sued upon. It was in appellant's possession as freight, and it is so admitted by appellant's manager. It could not be reached by process in rem, except as freight, and the seizure of it by libel in rem evidences the understanding and intent of appellant that such packages were in its possession as part performance, which condition was fatal to a claim of anticipatory breach.

The third circumstance is a telegram dispatched to respondent's Ontario office on June 28th, and the letter sent to respondent's agent in San Francisco on the same date (141). These have been previously quoted. If the contract had not been existent and in force on June 27th, 1916, at 9 p. m., appellant

was not called upon to advise the date and hour when performance on respondent's part was due; and if such contract were not so existent, there was no basis for the claim there advanced by appellant for demurrage at the rate of $3,000 per day. According to its own testimony (162), appellant intended to tell the Ford Motor Company by that letter that the contract was still in force. By no form of sophistry can appellant argue away the effect of these indisputable facts, appellant by such deliberate acts elected to continue the contract in effect, believing that its interests would be served thereby. There was accordingly no anticipatory breach.

Appellant's claim that respondent breached the contract by not delivering the full 6200 tons of cargo on June 27th is more properly applicable to a theory of actual breach. That matter has been fully discussed in the earlier pages of this brief.

The cases cited at pages 45 and 46 of appellant's brief announces no principle of law at variance with the decisions above noted. Indeed we can not conceive that the State Courts or the Circuit Court of Appeals would set at naught the decisions of the United States Supreme Court as declared in *Roehm v. Horst* and *Dingley v. Oler*. We respectfully urge consideration of the latter case because of the close similarity of facts. The rule announced by the Supreme Court of Connecticut in *Wells v. Hartford Manilla Co.*, supra, is peculiarly applicable to

the instant case. On the subject of acceptance of renunciation, the Court there says:

> "A renunciation does not create a breach. There must be an adoption of the renunciation. The renunciation must be so distinct that its purpose is manifest and so absolute that the intention to no longer abide by the terms of the contract is beyond question. The acquiescence therein must be as patent. There must be no opportunity left to the promisee to thereafter insist upon performance if that shall prove more advantageous, or sue for damages for a breach if events shall render that course the more promising".

Viewed in the light of that rule, which so far as our research has discovered is universally accepted, it is patent that there was no anticipatory breach on the facts of this case.

III.

CONSTRUCTION OF THE CONTRACT.

Appellant's argument is directed to a discussion of the meaning of the contract words "June loading". Proctor for appellant advances the theory that "June loading", as used in this contract means loading at sometime other than June. Respondent claimed in the District Court, and now insists, that the term "June loading" as employed in the contract meant that W. R. Grace & Company undertook to move respondent's cargo in June.

Appellant's argument on final analysis is really this: The term "June loading" does not mean loading in June, but does mean loading sometime when the Cacique should return from her expected trip to Oriental ports. That is not the meaning of the words "June loading" given by appellant's manager at the trial. He had two explanations of the term. One was that the requirement for "June loading" would be met by putting a few packages, or a few tons, aboard the steamer on the last day of June, even though afterwards it was necessary to fumigate the vessel with this much of the cargo on it. His next explanation was that "June loading" could be made at any reasonable time after June. In claiming this, as was readily seen, however, he claimed too much, for if the term "June loading" did not require appellant to load and move respondent's cargo in June, it did not require respondent to have that cargo ready for loading in June. The term could not be read as furnishing a fixed date for performance on the part of one party to the contract, and as providing for no date of performance, on the part of the other party.

We shall not attempt an elaborate discussion of this question: We believe that the words "June loading", singly and collectively, are perfectly clear if we shall take the contract by the four corners, put ourselves in the position of the parties who signed it and read it.

The Ford Motor Company of Canada was seeking space to move its automobiles to Australian ports.

It went to Grace & Company for space because there was not sufficient space otherwise available for its wants. The first step in the negotiations was Mr. Davis' visit to Grace & Company upon receipt of the telegram from respondent bearing date February 23rd, 1916. That telegram required Davis to secure for respondent space for "May and June sailing" (361). Davis wired in reply February 24th, "If you can take 6200 tons for early June can close with Grace Company". Respondent answered February 25th, "Accept Grace offer 6200 tons. Confirm advising names and dates of sailing". On the strength of these wires, Davis signed the contract, and on February 27th confirmed the same by wiring respondent, "Have signed with Grace American Steamer Cacique about June 24th".

Davis had only the limited authority evidenced by the telegrams, that is to say, he was authorized only to secure space for not later than June sailing. Libelant knew this limitation for it was shown the telegram upon which Davis acted. Libelant alone drew the contract for "June loading". Davis obviously accepted it, believing that he was getting what he was authorized to get, namely, "June sailing", for all his later correspondence with respondent treats the term "June loading" as "June sailing". The term must, therefore, be so accepted in considering the rights and obligations of the parties under the contract (California Civil Code, 1649, 1654 and 1636).

If Mr. Davis had signed a contract containing the clause "Shipment: per 'Cacique' June, July or August loading", it would not have been within the scope of the authorization to him and the respondent could have ignored his act had it so elected. "Shipment: per S. S. 'Cacique' *June* loading," does not mean: "Shipment: per S. S. 'Cacique' June or July or August loading". Nor does it mean: "Shipment: per S. S. 'Cacique' loading to begin when she returns from the Orient". The language employed in this agreement is altogether inappropriate to express the meaning that libelant now attempts to attach to it. It would have been very simple to use language that would have meant what libelant says it was intended to express, but that language would have been very different from the words actually employed.

The language of the contract must govern, and the intention of the parties is to be ascertained from the language alone, if such language is clear and explicit. The words "June loading" are in themselves, clear and explicit. There is no showing that they were used in a technical sense or that they have a different meaning by usage. They are, therefore, to be understood in their ordinary and popular sense (Civil Code, 1644, 1638 and 1639).

If there were any ambiguity or uncertainty in the term *"June loading,"* it was because libelant, who drew the contract and chose its terms, made it so. It must, therefore, be construed in the sense accepted

by respondent. The telegrams already quoted, and the subsequent correspondence show this was "June *sailing*" (267, 268, 270, 272).

The argument of appellant, both as to the construction of the contract and as to the absence of the cancellation clause, is completely answered by the decision of the Circuit Court in *Gray v. Moore et al.,* 37 Fed. 266. The action was in admiralty on libels for breach of contracts to furnish freight. The agreements were to furnish cotton "per S. S. City of Manchester, here about 20th of November * * * for Havre, at three-quarters cents per pound". The vessel did not reach her loading port until December 6th. The freight owners claimed release from the contract because the vessel did not arrive in time to carry out the contracts. The ship's agents asserted that at the making of the contract they had exhibited their information as to the position of the ship, upon which they estimated the date of her arrival, and that proceeding on such facts they did not contract for November shipments or with the cancellation clause.

The Court says:

> "On this showing it seems clear that the contention of the defendants that they entered into the contracts on the faith of the representations of the agents of the ship that she would arrive about November 20th is well founded."

After commenting upon the fact that the agents for the ship advised the owners of the information given to the shippers that the vessel would arrive

soon after November 20th, which is the equivalent of the information obtained by libelant from the telegrams exhibited in the present case.

The Court proceeds:

> "When time, therefore, is specified, and both parties contract with regard to it, whether it be the time at which the vessel is to be ready to receive cargo, or the day of sailing, or of arrival outwards, or the day of any other event in the voyage, the courts hold that it is in the nature of a condition precedent to the rights of the owner under the rest of the charter-party." Macl. Shipp. 372. Time and situation of a vessel are materially essential parts of the contract of charter-party or affreightment. See Lowber v. Bangs, 2 Wall. 732; Davison v. Von Lingen, 113 U. S. 50, 5 Sup. Ct. Rep. 346; Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. Rep. 12; Filley v. Pope, 115 U. S. 213, 6 Sup. Ct. Rep. 19; Rolling-Mill Co. v. Rhodes, 121 U. S. 260, 7 Sup. Ct. Rep. 882. The proctors for libelant contend that, as there was no canceling clause in said contracts, (and on this point there is some evidence to show that the ship's agents refused to put in a canceling clause), the contract was enforceable against the defendants at whatever date the ship might arrive. On this point it is only necessary to say that the presence or absence of a canceling clause in the contracts sued on can cut no figure; because the contracts were based upon untrue representations as to the sailing and arrival of the ship, which representations amounted to warranties on the part of the ship and her agents. It seems clear that libelant cannot recover, and judgment to that effect will be entered; costs of this and the district court to be paid by libelant."

The Supreme Court in *Davison v. Von Lingen,* 113 U. S. 40, construed a stipulation that the vessel is "now sailed or about to sail from Benizaf with a cargo for Philadelphia". At the time the charter was signed the charterers wanted a guaranty that the vessel would arrive in time to load in August. This was refused and the clause permitting cancellation for late arrival was stricken from the charter before signing. The steamer sailed from Benizaf eight or nine days later than the date of the charter and did not make her loading port until September 7th.

We quote the following from the Court's decision:

> "That the stipulation in the charter-party, that the vessel is 'now sailed or about to sail from Benizaf, with cargo, for Philadelphia', is a warranty or a condition precedent, is, we think, quite clear. It is a substantive part of the contract and not a mere representation and is not an independent agreement, serving only as a foundation for an action for compensation in damages. A breach of it by one party justifies a repudiation of the contract by the other party, if it has not been partially executed in his favor."

It is universally recognized that promptness is essential in fulfillment of commercial contracts.

In *Lowber v. Bangs,* 2 Wall 728; 17 L. Ed. 768, the court said:

> "Promptitude in the fulfillment of engagements is the life of commercial success. The state of the market at home and abroad, the solvency of houses, the rates of exchange and of freight, and various other circumstances

which go to control the issues of profit or loss, render it more important in the enterprises of the trader than in any other business."

In *Norrington v. Wright,* 115 U. S. 188; 29 L. Ed. 366, it was said:

"In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. Behn v. Burness, 3 B. & S. 751; Bowes v. Shand, 2 App. Cas. 455; Lowber v. Bangs, 2 Wall. 728 (69 U. S. bk. 17 L. Ed. 768); Davis v. Von Lingen, 113 U. S. 40 (Bk. 28, L. Ed. 885).

Referring to the prima facie meaning of the language as written libelant argues, that the clause "will advise more definitely as to exact loading date" referred to the month of loading, as well as to the day, and that the contract therefore, provided no month and no day for loading. This construction, however, does violence to the contract as written, by practically expunging the two words "June loading" which were put into the contract for some purpose. We construe the clause "will advise more definitely as to exact loading date" in conjunction with "June loading", and as indi-

cating that, while the loading was to be made in June, the exact date in June was to be fixed by appellant when, on the approach of the vessel, that date could be more definitely determined. Such a construction preserves all provisions of the contract and allows them to function as written, and accords with the plain, everyday meaning of the words.

For the ostensible purpose of showing the intention of the parties in making the contract, libelant has quoted the testimony of its manager, Mr. Carter, and its traffic clerk, Mr. Moore. While it is conceded, as a rule of law, that parol evidence of the surrounding circumstances is admissible in the interpretation of a contract, that rule is also subject to exceptions which are universally recognized. This was the rule of the Common Law and it has been crystallized into Section 1647 of the *Civil Code,* and Section 1860 of the *Code of Civil Procedure* of California. Speaking on that question, the Supreme Court of California say in *United Iron Works v. Outer Harbor Co.,* 168 Cal. 84.

> "This rule of evidence is invoked and employed only in cases where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other *than* what they said but by showing what they meant *by* what they said." (Quoting numerous authorities.)

There is nothing doubtful about the term "June loading". It is as clear as "June wedding" or

"June delivery" are in ordinary parlance. Moreover, it is settled by the decisions and, in many states, by statute, that all previous negotiations or representations are merged into the contract as written, unless reformation of the contract is sought, which is not the case here. Giving to the testimony quoted the broadest significance, it means that libelant told Davis, while the contract was under negotiation, that no definite date for loading could be determined. The same witness testified that respondent's agent Davis was seeking cargo space for May and June sailing. This was known to libelant's officers, and they admit, though with some reluctance, that Mr. Davis was assured that the cargo would be loaded some time in June (122, 123). Assuming, however, that the effect of the conversations attempted to be stated by interested witnesses after a period of four years, was tantamount to absolute refusal to load respondent's cargo in June, appellant's case is only brought in line with *Davison v. Von Lingen* and *Gray v. Moore,* supra, where though a cancelling clause was refused when the contract was drawn, the Court held that the date named in the contract there under consideration, namely,— "about 20th of November", must control. Libelant's officers knew that respondent wanted cargo space for May or June sailing. They did not refuse to give May or June sailing, nor did they adopt any language excluding liability for the ship's failure to load in June. They wanted Davis to understand that he was getting "June sailing" which was what he

sought, or, at any rate, "June loading". Davis got all his information from libelant's office and it is significant that his telegram of February 24th asking authority of respondent to sign the contract, transmitted the information undoubtedly obtained from libelant, that Grace & Company could take the 6200 tons "for early June". This was the information upon which respondent authorized the contract which was signed on the following day. Confirmation of what was then understood is found in Davis' telegram of February 27th, and in his letter of March 1st, in which he says, referring to the Steamer Cacique, "the boat is scheduled to sail about the 14th of June" (268). His letter of April 3rd, to respondent, gives the date as "June sailing" (272). Such was evidently his understanding of the arrangement, and that was in line with his instructions. Libelant was aware of Davis' limited authority and also knew that his principal was seeking space for May and June only. Assuming that Mr. Davis would, in the light of his specific instructions, have accepted a contract permitting loading after June, or at some indefinite time when, weather and other conditions permitting, this vessel should return from her proposed Oriental voyage, is it reasonable that Grace & Company, who drew the contract without the advice or assistance of respondent's agent, would have drawn it in its present form, if their undertaking was merely to load the cargo upon the return of the Steamer Cacique from her voyage to Oriental ports? Libelant's of-

ficers wanted as definite a date as the circumstances would permit, because they wanted to collect demurrage in the event of default at the rate of $3000.00 per day. They thought they could make a June sailing, and they provided in the contract for a June loading, with a reservation that the exact loading date in June would be named later. That is the only reasonable construction that can be placed upon the language used but, if as before stated, there is any uncertainty or ambiguity in the language, it must be interpreted against the drawer, libelant, and in favor of the understanding of respondent, which, as appears in the telegrams and letters above noted, was "June sailing" or at least June loading of the complete cargo.

The statements attributed to Mr. Davis when he was interviewed shortly before the trial by counsel for libelant in the presence of witnesses, were not in conflict with the understanding above mentioned, nor with the testimony of Mr. Davis that he had asked Grace & Company for space for June sailing (326, 324, 328). If there was any conflict between the witnesses as to what Mr. Davis had said in November, 1920, the decision of the Court who saw the witnesses and could judge of their credibility, is decisive (*The Bailey Gatzert,* 179 Fed. 4th; *The Beaver,* 253 Fed. 312, 313; *The Hardy,* 229 Fed. 985). However, if it had been understood, when the contract was made, that the definite date of arrival could not be fixed, that only explains the reason for inserting the clause previously noted, re-

quiring libelant to give notice of exact loading date when vessel is nearer port. That fact gives support to the claim that June was understood to be the loading month, but that the day in June was left open.

The record of the trial is a complete answer to the insinuations, for they are not statements, contained on page 58 of Appellant's Brief. Proctor for appellant had access to, and the use of, all respondent's files so far as known to counsel (264). Appellant's comment on the assumed absence of the communications which passed from respondent to its agent Mr. Davis, prior to the making of the contract, is met by the fact that a portion of such correspondence namely, the telegrams of February 24th and 25th, were obtained by proctor for libelant, from the files produced by respondent, and were introduced in evidence (265). The remaining telegram, that of February 23rd, was discovered later and produced *sua sponte* as counsel would have it, on the last day of the trial (361). From such correspondence, it appears that on February 23rd, respondent asked Davis to "secure space for 4000 tons May and June sailing", and the same telegram indicated that respondent had already provided space for "2200 tons April and May sailing" (361). After seeing Grace, Davis advised respondent February 24th "If you can take 6200 tons for early June can close with Grace" (265); and to that, respondent answered, February 25th, "Accept Grace offer 6200 tons confirm advising

names and dates of sailing" (265). After signing the contract on February 25th, Davis telegraphed and wrote respondent that the contract had been signed, and that it provided for 6200 tons, "to sail about the 14th of June" (268). The omission of this correspondence was stated by Counsel to indicate that respondent did not want "June loading" or "June sailing" and that Mr. Davis' authority was not limited to securing space for June, and therefore, inferentially, the contract is not to be construed as requiring June sailing or June loading. The evidence is in the record however, and it conclusively shows: That respondent was seeking space for May and not later than June sailing; that Davis was not authorized to secure space for sailing later than June; that he was given to understand that the S. S. Cacique would sail early June. afterwards explained as June 14th; that he so advised respondent and that the contract was entered into upon that understanding.

Appellant's next reliance is upon what is termed "the practical construction given to the contract". By this is meant the correspondence between respondent and Mr. Davis. It is probably needless to say that, if the contract when it was made, meant that the shipment was to be loaded in June, then it necessarily meant the same thing when the libel was filed, because no change had been made in the contract as between the parties. Consequently, the only relevancy of the correspondence between respondent and its agent, was to show, if possible,

some admission which would serve to undermine respondent's contention that "June loading" required complete loading in June. Though learned counsel has quoted pages of extracts from letters, he has drawn our attention to no statement containing any admission in support of his contention or in derogation of respondent's claim.

The correspondence between the respondent and the Ford Company of San Francisco subsequent to the time when the contract was made, does not contain anything indicating that the contract shall have a different meaning from that which ordinarily attaches to the words used. The *meaning* of the words used in the contract is in no wise affected by that correspondence. In fact both Davis and respondent throughout the correspondence, until their construction was questioned by libelant, treated the contract as one for *June sailing,* which was in line with Davis' authority (266, 268, 270). After that, and in the light of libelant's claims, they insisted that "June loading", if it did not mean "June sailing", certainly required complete loading in June.

In view of the above, any extensive consideration of the correspondence on respondent's part is unwarranted. We will, however, refer to some few matters because their significance has been clearly misunderstood by counsel. The telegrams and letters passing between Mr. Davis and Ford Motor Company show that shipments from respondent's factory were arranged by months. The month was

the unit of shipment in every instance, as may be seen by reference to the correspondence cited by appellant (265, 269, 270, 271). The contract made in May with Peabody & Company for furnishing 542 tons to supplement the Cacique cargo does not affect the meaning of the contract sued upon. At that date, respondent had discovered its shortage of cargo and was contracting to supply as much tonnage as was possible for the vessel. The expression "about July 1" is not inconsistent with "June loading" and certainly is not an admission that would change the import of the previous contract. As was said by the District Court, the expression used by the Southern Pacific in a formal letter written in May to Grace & Company, even though it were also sent to respondent, indicating "June or early July" without stating whether it was sailing or loading, is equally immaterial.

The letter of May 31st referring to the willingness of the Union Steamship Company to release any of respondent's freight remaining after July 1st, for the purpose of enabling respondent to fill its undertakings under the present contract, are the statements of the Union Steamship Company not of respondent. Furthermore at that time, respondent had notice that the steamer could not sail until July, and it was asserting in correspondence with libelant its right to be relieved from damages, if the vessel did not load and clear in June.

The Davis letter of June 13th, expresses the hope that the vessel will be as late as the 10th of July,

and this is seized upon by appellant, as indicating that respondent did not want a June loading or sailing. We realize that counsel is privileged to draw inferences, but only from the facts or the record. The correspondence explains the reason for this hope. Respondent's agent was then disturbed at the apparent shortage in the cargo, and he hoped that the steamer would be late for two reasons. First, because as he viewed the contract, respondent would have been exonerated from damages if it was short on the contract tonnage. Second, he had the prospect of the Union tonnage of which there was a great deal then in San Francisco to draw upon after July 1st, to make up the shortage. In other words, he hoped that since respondent was apparently short on tonnage, some solution of its difficulties might appear if the steamer did not arrive in time to make "June loading" Reference was also made in one letter to the congestion of shipments for Australia, and proctor for appellant has seized upon that. Explanation of the statement is in the correspondence itself. There had been delays on the part of the Union Steamship Company in moving respondent's cargo, and respondent's sales department expressed great concern in behalf of its customers at the fact that apparently so many cargoes of automobiles would arrive in Australia at about the same time. Such expressions were natural in the course of business. They did not actually or in effect touch upon the meaning of the term "June loading" as used in the

contract. The term was impressed with a fixed meaning, complete at the day the contract was drawn. Subsequent correspondence between one of the parties and a third party could not change it. There was no correspondence on the subject as between the parties themselves until the controversial days of June, and therefore the meaning that the term "June loading" had when the contract was signed on February 25th, was the meaning that must be given to it on the day the libel was filed. We have shown, we submit, that "June loading", meant loading in June and nothing else.

IV. ANSWER TO THE ARGUMENT THAT THE LIBEL SHOULD BE SUSTAINED EVEN THOUGH IT WAS PREMATURELY BROUGHT.

We have read and reread the argument of appellant, in the hope that we would, though perhaps we have failed, to get its import. Counsel first complains that the learned District Court held that an action could not be maintained for an anticipatory breach of a contract unless the breach existed when the libel was filed. This is a fundamental rule of law. No contracting party, on any theory of law, can be sued for a breach of contract, before performance on his part is due. Performance is due either at the time fixed and according to the terms of the contract, or damage lies as for a breach of the contract because, before performance was due, the party sued, repudiated the contract entirely

with the result that the injured party elected to take advantage of that renunciation and immediately sue. The burden of proving anticipatory breach is on the party alleging it. If the proof of anticipatory breach fails, the necessary result is that the action was commenced before performance was due on the part of the defendant. Upon no legal principle can such an action survive. The facts are, and they stand practically undisputed, that when appellant filed its libel, the Steamer Cacique was laden with an inland cargo which could not be unloaded, at best, for several days; she was unseaworthy and would not be able to clear the port of San Francisco without a certificate from Lloyds' surveyor; the necessary repairs required that she go into drydock and she did, and was not ready to load until July 12th. She then completed loading on July 26th and sailed that night or the following morning. Under these circumstances, libelant would have had no right to load respondent's cargo and take the vessel into drydock or otherwise deviate from the intended voyage (*The Indrapura,* 171 Fed. Rep. 929).

When the libel was filed, the vessel was not only unable, and not ready, to load respondent's cargo, but the time for loading had not arrived. Under the contract, time for performance or delivery on respondent's part, was to be "as fast as vessel can load". But the exact days of June during which the cargo was to be loaded, were to be fixed by a notice from libelant, stating exact loading dates

when the vessel was closer at hand. In the latter part of June, and before the vessel's arrival at the port of San Francisco, appellant specified June 27th, 28th and 29th as the days upon which it required respondent to deliver the cargo under the contract. When the libel was filed only one-half of the first of these three days had elapsed. Appellant could not thus ask performance on the 29th of June, and sue for breach on the 27th, and no legal principle will sustain an action so instituted.

But why should the libel survive? Would appellant be entitled to claim on some other breach not alleged in the libel, or to amend its libel and set forth a new cause of action, or is appellant's real purpose to be found in the suggestion that it be permitted to withdraw a statement made by proctor for libelant in open Court? A concession or stipulation entered into in open Court is the most solemn form of evidence that can be produced. We are confounded there should even be a suggestion of withdrawing such a stipulation after the case has been tried, submitted and decided.

We are aware that the liberality of the admiralty practice permits the consideration of the case *de novo* in this Court, and appellant might be permitted in a proper case to amend his pleading so as to state his case. But this has not been shown to be a proper case and under the rules of this Court, an application for leave to make new allegations, or to

pray different relief, or to offer new proof is now too late. Withdrawal of evidence so far as our research has shown is not permissible and the reasons therefor are aptly stated in *The Saunders,* 23 Fed. 303, and *Singlehurst v. La Compagnie, etc.* 50 Fed. Rep. 104, 105.

Amendments have been allowed in cases where because of a technical ruling, determined by the appellate Court to have been erroneous, proper evidence was excluded in the District Court, the appellate Court has permitted the evidence to be taken. Such are the facts in one of the cases cited by appellant. In the instant case appellant has no evidence to produce. Nothing that was offered in behalf of libelant's case was excluded in the District Court. It developed its theory of the case to the utmost, and the case failed, as we have shown in the foregoing pages, not because libelant had misconceived or misstated its case in its pleadings, or in its proof, but because on the facts and the evidence produced, it had no case at all when the libel was filed. The District Court in deciding the case took into consideration all the facts, the character of the witnesses, and the situation of the parties at the time, and before and after, the libel was filed. It rendered its decision on legal grounds according to the evidence, and with a view, as expressed in the opinion, to substantiate justice. The conclusions of the Court are sustained by the evidence and are supported by the decisions of the United

States Supreme Court. The questions involved were largely of fact and the rule under such circumstances is that the decision of the District Court will not be reversed except for manifest error.

The Dolbadarn Castle, 222 Fed. 838;
The Hardy, 229 Fed. 985;
The Bailey Gatzert, 179 Fed. 44;
The Beaver, 253 Fed. 312.

We object with all the earnestness at our command to the exercise of any discretion, either in permitting the withdrawal of evidence, or the introduction of additional evidence, or the amendment of the pleadings on this appeal.

The libelant deliberately sought by a hasty libeling of respondent's goods on the plea of anticipatory breach, to obtain an advantage in the way of damages, to which it was not entitled. It was not entitled to sue or to claim damages because the time fixed by it for performance had not expired, and also because its vessel was unseaworthy, and could not load until she had gone into drydock and undergone repairs. Knowing these facts, appellant verified a libel that falsely stated that libelant's vessel was ready to load this cargo. Libelant's manager admitted on the witness stand that this was impossible, and that he knew it when he verified the libel. Appellant, therefore, was masquerading under false colors and is not in a position to ask this Court to exercise a discretion in its behalf.

On the merits we submit that the decision of the District Court should be affirmed in every particular with costs.

Dated, San Francisco,
October 17, 1921.

Respectfully submitted,
W. F. WILLIAMSON,
Proctor for Appellees.